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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Thirty-third session

SUMMARY RECORD OF THE 692nd MEETING

Held at Headquarters, New York,
on Thursday, 22 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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00-49470 (E)

The meeting was called to order at 10.10 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470, 472 and Add.1-4; A/CN.9/XXXIII/CRP.8)

Chapter V

1. The CHAIRMAN said that, as previously agreed, the Commission would interrupt its consideration of article 11 so that the observer for the Hague Conference on Private International Law, who would be unable to participate in the remainder of the current session, could raise a series of issues concerning chapter V of the draft Convention (arts. 28 to 32).

2. Ms. KESSEDJIAN (Observer for the Hague Conference on Private International Law) said that, although the assignment of receivables was on the agenda of the Hague Conference, it had elected to consider the topic only in the context of a joint working group in which some members of the Commission had participated. Although some of the private international law rules established in the draft Convention did not correspond exactly to the joint working group's suggestions, they were nevertheless quite satisfactory.

3. However, chapter V raised a number of issues. If, as planned, articles 28 to 32 became a "mini-convention" available to States whose domestic legislation did not include the necessary provisions of private international law, there might be problems in cases where the conflict-of-law rules embodied in the draft Convention differed slightly from those established in the Rome Convention and other regional instruments. The Commission should endeavour to identify specific situations where such difficulties were likely to arise.

4. With regard to the scope of application of chapter V, she noted that article 1 (3) and the words "With the exception of matters that are settled in this Convention" in articles 28 (1) and 29, all of which were currently placed in brackets, would have to be reconsidered if the "mini-convention" approach were adopted. It was important to ensure that States parties could not use articles 28 and 29 as an excuse for avoiding application of the substantive law provisions contained in the rest of the draft Convention. The best solution might be to make a single such statement at the beginning of chapter V.

5. Article 28 (2) stated that, in the absence of proof to the contrary, the contract of assignment was presumed to be most closely connected with the State in which the assignor had its place of business. A similar statement might be included in article 6 in order to resolve the problem of establishing location for transactions involving branch offices of financial service providers.

6. Article 28 (3) was clearly modelled on article 3, paragraph 3, of the Rome Convention. Such a provision was appropriate to the latter instrument, which did not define the term "internationality" and could therefore be taken to apply to all contractual obligations, including domestic ones. Since the draft Convention contained such a definition and, except in one case, applied only to international assignments, article 28 (3) might cause more problems than it solved.

7. Furthermore, if the Commission elected to establish chapter V as a "mini-convention", an explicit exclusion of renvoi must be added to article 28 and the comments on the ambit of the draft Convention (A/CN.9/470, para. 191) must be reflected in the actual text of article 28 (1).

8. She did not fully understand the role of article 30, which had been placed in brackets; even if the Commission took the "mini-convention" approach to chapter V, article 30 should be drafted along the same lines as article 24 for the sake of consistency. In any case, she found it redundant to include both article 30 (2) and article 32 in the draft Convention.

9. Mr. FERRARI (Italy) agreed with the comments made by the observer for the Hague Conference concerning the private international law rules not covered in chapter V. Although he was not in favour of establishing articles 28 to 32 as a "mini-convention", he agreed that such an approach would require the redrafting of other articles.

10. He thought that the exclusion of renvoi had been dealt with in article 6 (j), although it was true that under the "mini-convention" approach that article would not apply to private international law rules. However, under article 1 (3) in its current form, those rules would remain in force regardless of the applicability of the draft Convention, in which case the concerns raised by the observer for the Hague Conference would need to be addressed.

11. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that articles 30, 31 and 32 had been placed in brackets pending the finalization of articles 24 to 27. Articles 30 (2) and 32 were indeed very similar; the Working Group had decided to model the substance of article 30 on article 24 for reasons related to the scope of the draft Convention. The Commission would have to resolve that problem at a later date.

Article 11

12. The CHAIRMAN invited the Commission to resume its consideration of article 11 and, in particular, the Secretariat proposal contained in paragraph 104 of the analytical commentary to the draft Convention (A/CN.9/470).

13. Mr. MEDIN (Observer for Sweden) suggested that the Commission should first decide whether to delete article 11. Anti-assignment clauses were effective under Swedish domestic law; the country's industries were strongly in favour of retaining that article, which they considered to be the instrument's most important provision.

14. If article 11 was retained, it would be appropriate to state therein that the debtor could not declare the original contract avoided on the sole ground that the assignor had violated an anti-assignment clause.

15. Mr. MORÁN BOVIO (Spain) said that he would prefer to retain article 11, which made it clear that an assignor who violated an anti-assignment clause was responsible to the debtor and that the draft Convention did not affect national restrictions on such clauses. He also supported the Secretariat proposal; in

case of uncertainty concerning the interpretation of article 11 (2), the proposed amendment would make the assignee's position secure.

16. The CHAIRMAN said that, since the Working Group had already approved article 11, it would be retained unless there was strong support for its deletion.

17. Mr. DOYLE (Observer for Ireland) said that inevitably there were provisions in the draft Convention that certain delegations might find strange or unacceptable. He fully sympathized with those delegations which found article 11 alien to their national systems, as the same objection had been raised in Ireland. However, for States to ask for a provision to be removed for that reason was an indulgence which the Commission could not afford. The Secretariat proposal in paragraph 104 was a valuable clarification of article 11. The debtor's remedies should be preserved, but should not include avoiding the original contract, or article 11 would be meaningless.

18. Mr. BURMAN (United States of America) noted that the Commission's aim was to adopt a modern approach to encourage the extension of credit to areas of the world where it was urgently needed. Certain core provisions of modern finance law had to be included; if a provision of the text was inconsistent with a domestic law, a country always had the option not to implement the instrument. The alternative of watering down critical provisions that were vital to the draft Convention was unacceptable. His delegation would explain to lawmakers why the Convention differed from domestic law and some elements of that law would need to be changed. If at each meeting a delegation could object to a provision inconsistent with its national law, the Convention would not be ready until 2005 instead of 2001.

19. On the basis of the discussion, his delegation agreed with the solution proposed in paragraph 104 of document A/CN.9/470.

20. Mrs. STRAGANZ (Austria) clarified that her delegation did not wish to delete or question article 11, which was a key provision of the draft Convention. It was unlikely that it would be misinterpreted, as businessmen were likely to go to courts where the issues involved were understood. Her Government did still have concerns, and she had therefore expressed them, but her delegation accepted the proposal in document A/CN.9/XXXIII/CRP.8, as well as the proposal in paragraph 104 of the commentary.

21. Mr. CARSELLA (Observer for the Commercial Finance Association) said that members of the Association who financed those types of receivable were concerned that they might have to review individually vast numbers of receivables in order to determine which ones could be financed. Such an onerous task would result in the banks refusing to offer financing, which would defeat the purpose of facilitating low-cost financing to businesses around the world.

22. Mr. MARADIAGA (Honduras) said that the arguments for retaining article 11 had been convincing. However, the principle of good faith was very important in contractual law, in the context of negotiations and also in the execution of contracts. He wondered what would happen if the third party referred to in article 11 (2), was deliberately trying to cause harm.

23. Mr. FRANKEN (Germany) was in favour of retaining article 11 and also believed that the Secretariat proposal in paragraph 104 should be included to cover contracts concluded for a long period of time. When an anti-assignment clause had been breached, the debtor should perhaps have the right, in addition to a claim for compensatory damages, to terminate such a contract. If the Commission did not agree with that course of action, his delegation would in any case accept the proposal in paragraph 104.

24. Ms. McMILLAN (United Kingdom) understood that paragraph 104 offered two alternatives: limiting the relief available to the debtor against the assignor for breach of an anti-assignment clause to a claim for compensatory damages, or stating that the debtor might not declare the original contract avoided on the sole ground that the assignor had violated an anti-assignment clause.

25. Article 11 did not require amendment; however, if there was a consensus in favour of change, she would prefer the second alternative. The first one seemed interventionist, as it was unclear whether compensatory damages would be what the debtor would wish.

26. Mr. STOUFFLET (France) supported the current wording of article 11; it seemed unnecessary to be more specific about the risk of avoidance of the contract at the request of the debtor. There should be no such risk, because paragraph (1) provided absolute protection to the assignee against all the possible consequences of a breach of an anti-assignment clause. Any addition was superfluous, and could have unexpected and undesirable effects. A contract was often a complex matter with numerous obligations, of which only the monetary obligations were transferred to the assignee. In relations between the assignor and the debtor, it might be desirable under domestic law to allow the contract to be cancelled. That could be a way for the debtor to obtain the cancellation of contractual obligations other than the monetary obligations that had been transferred. Sometimes, several contracts were interlinked and failure to perform an obligation arising from one contract could have the effect of annulling a whole series of contracts. The Commission should also consider cases where the assignment was not total, as in the case of successive contracts for a lease, where there was an obligation to pay rent due each month or year. It was quite possible that the assignment related only to part of the monetary obligations under the contract. Why prevent termination at the request of the debtor? The first paragraph of article 11 was sufficient to prevent there being any consequence for the assignee; the issue would be the relationship between the assignor and the debtor, and the law regulating their obligations.

27. Mr. MEENA (India) said that the first paragraph of article 11 had an overriding effect on contractual arrangements. Paragraph (2) did not intend to lift the limitation on assignment so that the assignor was not liable for a breach of agreement between the assignor and the debtor. It attempted to protect any assignee or related person which was not a party to the agreement between the assignor and the debtor, by ruling out liability on the sole ground that such a person had knowledge of the agreement.

28. His delegation accepted article 11 as well as the Secretariat proposal in paragraph 104.

29. Mr. HERRMANN (Secretary of the Commission) wished to clarify the Secretariat proposal in paragraph 104. The draft Convention did not need to address the issues of good faith or malicious intent, because there were already general principles of law to deal with those issues. Article 11 (2) referred to possible consequences, despite the assignment being effective, and seemed to require the additional clarification that breach of an anti-assignment clause was not a basis for avoiding the contract. The intent was to exclude only the right to terminate the contract and not positively to regulate what the consequences would be, as the United Kingdom representative had pointed out. The exclusion of the right to avoid a contract on the sole ground of violation of an anti-assignment clause would take care of the example of a partial assignment. If there was a right to avoid the contract because of connections with other contracts, the exclusion would not operate.

30. Mr. Al-NASSER (Observer for Saudi Arabia) also supported article 11, but had some concerns about the first paragraph. He proposed adding the words "unless there is an anti-assignment clause under the law of the country concerned".

31. Mr. ATWOOD (Australia) supported the Secretariat proposal in paragraph 104, which would clarify the interaction between paragraphs (1) and (2) of article 11. His delegation preferred the second of the two alternatives in paragraph 104, namely to restrict the debtor's right to avoid the contract.

32. The CHAIRMAN recalled the Secretariat clarification that the proposal in paragraph 104 did not place any limitation on remedies available to the debtor for breach of an anti-assignment clause by the assignor. The aim was to ensure that the contract was not terminated purely because of the breach of such a clause. If that policy direction was accepted, the drafting group could decide on the wording.

33. Mr. IKEDA (Japan) said that his delegation was in favour of adopting article 11 as currently worded.

34. Mr. FRANKEN (Germany) also approved the present wording of article 11. However, in a contract concluded for a longer period of time, there seemed to be no reason why the debtor should not terminate a contract because of the breach of an anti-assignment clause. It would certainly have that right under German law. The purpose of article 11 was to protect the assignee, by making the assignment valid despite any anti-assignment clause. However, there was no intention of protecting the assignor. That was a matter of policy rather than drafting.

35. The CHAIRMAN confirmed that it was a policy matter that still had to be settled. However, there seemed to be a consensus to retain the provision to negate anti-assignment clauses.

36. Mr. TELL (France) said that the Secretariat clarification had only increased his delegation's concern. The Secretariat had said that a contract could not be avoided on the ground of breach of an anti-assignment clause. Paragraph 104 also made that clear. He shared the view expressed by the representative of Germany. Such interference with domestic law would make

ratification very difficult. His delegation was prepared to accept article 11, which would require modifying national legislation to ensure that anti assignment clauses would not have any effect on the assignee as far as cancellation was concerned. However, to specify that the debtor had no possibility of avoiding a contract when an anti-assignment clause had been violated was going too far.

37. The CHAIRMAN suggested that, since there appeared to be broad support for retaining article 11, the Commission should focus on the need to include in the text wording that explicitly excluded the right of the debtor to terminate its contract with the assignor because of a breach by the latter of an anti-assignment clause.

38. Mr. COHEN (United States of America) reiterated his delegation's support for the incorporation in article 11 of wording along the lines proposed by the Secretariat in paragraph 104 of the analytical commentary to the draft Convention (A/CN.9/470). The point made therein was a very important one. The purpose of article 11 was to protect the assignee against the assertion of a non-assignment clause. If, however, the debtor could avoid the contract on the sole ground that the assignor had violated such a clause, the outcome for the assignee would be the same as if a non-assignment clause were given effect. In both cases, the assignee would have purchased a receivable of no practical value. Unless assignees were afforded the protection that article 11 was intended to provide, they would have to examine the documentation of each individual original contract in a bulk assignment and the resulting expense would be passed on to debtors.

39. Mr. DOYLE (Observer for Ireland) said that, if article 11 was to work, it must negate any anti-assignment clause. It was true that the Secretariat proposal would constitute major interference in contract law, but that could not be avoided. It was difficult to square the opposition of certain speakers to the wording proposed in paragraph 104 with their assertion that they wished to protect the rights of the assignee vis-à-vis the debtor. Maintenance of the debtor's right to terminate a contract on the sole ground of violation of an anti-assignment clause would vitiate article 11.

40. Ms. GAVRILESCU (Romania) said that her delegation wished to associate itself with the views expressed by the representative of France. The Working Group had debated the provisions of article 11 at length. The language used in the draft Convention had enjoyed consensus and should therefore be retained as it stood. She saw no need for the wording proposed by the Secretariat.

41. Ms. SABO (Observer for Canada) endorsed the comments of the United States representative and supported the incorporation in article 11 of the wording proposed by the Secretariat in paragraph 104.

42. Mr. HERRMANN (Secretary of the Commission) urged those members of the Commission who wished to retain article 11 as it stood to indicate clearly their interpretation of paragraph (1). It was very important to clarify the extent to which rights accorded to debtors under national laws were excluded.

The meeting was suspended at 11.45 a.m. and resumed at 12.15 p.m.

43. Ms. McMILLAN (United Kingdom) said that delegations appeared to be very far apart in their interpretation of article 11. It seemed that the representatives of France and Germany saw that article as allowing the debtor to avoid a contract in the event of a violation by the assignor of an anti-assignment clause. Such an interpretation ran counter to the purpose of article 11: if the debtor could terminate the contract by relying on an anti-assignment clause, its willingness to discharge the debt would be diminished. It was clear from the Commission's discussions that article 11 was open to various readings and that its adoption as it stood would lead to complicated litigation between debtors, assignors and assignees.

44. Mr. FRANKEN (Germany) said that under many national laws debtors had the right to terminate long-term contracts to which they were party in the event of a material breach of the contract. That right should not be taken away. He proposed the incorporation in paragraph (1) of a clause to the effect that the debtor might not declare the original contract avoided on the sole ground that the assignor had assigned the receivables arising from it in violation of an anti-assignment clause, unless the assignment constituted a material breach of the contract. He emphasized that such a provision would apply only in the case of future receivables and not in the case of receivables that had already crystallized.

45. Mr. BRINK (EUROPAFACTORING) said that his delegation concurred with the observer for Ireland and the representatives of the United Kingdom and the United States in their interpretation of article 11. It seemed that other delegations wished to restrict the application of the article to an extent that would undermine the purposes of the draft Convention and limit, rather than promote, the assignment of receivables. He was not convinced that those delegations had understood the thrust of the Secretariat proposal: while excluding the right of the debtor to terminate the contract on the sole ground that the assignor had violated an anti-assignment clause, it would not affect its right to do so for any other reason. The Commission must keep in mind that any provision of the draft Convention that undermined the value of the receivable would be detrimental to the assignee.

46. Mr. STOUFFLET (France) said that his delegation had no desire to tamper with the principles underlying the law of contracts. Clearly, the rights of the assignee must be inviolable. However, there was no need, in order to achieve that end, to prohibit avoidance of the original contract as a sanction for violation of an anti-assignment clause. Maintaining the right of the debtor to avoid the contract would in no way undermine article 11.

47. Mr. COHEN (United States of America) said that the differences of opinion concerning the provision proposed in paragraph 104 were more apparent than real, since they centred on differences in the kind of transaction that each delegation envisaged and different understandings of the words "sole ground". In fact, however, there was full agreement that, where an assignor had fulfilled all its obligations and it only remained for the debtor to pay, the latter was not entitled to terminate the engagement. If, on the other hand, an assignor assigned all its rights under a contract to a third party, who failed to fulfil the contract, the debtor had every right to avoid the contract. United States law drew a distinction between assignments of the right merely to be paid, where

there was no delegation of performance to the assignee and no harm done to the debtor, and those which materially changed the debtor's duty, increased its risk or impaired its ability to obtain performance. The policy had surely been agreed and the drafting group could be requested to find the right wording. The proposal adumbrated by the German delegation and given formal expression by the Chairman was not wholly satisfactory: if the key element in the original contract was that it was not to be assigned, subsequent assignment might be claimed to be a material breach of the contract. Tnat was surely not the aim of the proposal, which rather sought to deal with instances in which the debtor was caused material harm because the assignment delegated duties to the assignee or otherwise impaired the debtor's right to get what it was entitled to.

48. Mr. MORÁN BOVIO (Spain) said that the debate illustrated the relevance of the provision proposed in paragraph 104, which went to the very heart of the draft Convention. By addressing the relationship between the assignor and the assignee, the Commission was impinging on domestic law either as codified or as expressed in a contract, since it excluded any possible interference in that relationship in cases where the contract contained an anti-assignment clause. It was therefore important that the draft Convention should contain a provision that non-compliance with an anti-assignment clause would not allow a debtor to declare a contract terminated. Such a provision would undoubtedly impinge on domestic law; but it might be necessary to go still further and stipulate that the debtor would have no monetary rights other than those arising out of the contractual relationship. The suggestion by the representative of Germany that assignments under long-term contracts, involving receivables yet to arise, might not be covered by article 11, was damaging to the agreement reached on that article, since the effect of the article would be undermined by any implication that some kinds of contract fell outside its scope. Nothing should be done to discourage assignors from assigning receivables, even ones that had not yet arisen, in long-term contracts. The draft Convention already made it clear that assignment did not alter any of a debtor's rights and, indeed, could actually improve a debtor's position. The example given by the United States representative was irrelevant, in that it related to the performance of the original contract. Article 2 concerned receivables arising from the original contract, which was quite another matter, even if it contained an anti-assignment clause.

49. Mr. DOYLE (Observer for Ireland) said that earlier discussions of the same point had not raised such difficulties. He understood the reservations of the French delegation, although it was hard to see how the assignee's rights against the debtor could be protected if the original contract no longer existed. The subject of the draft Convention was simply the assignment of the right of payment - hence the expression "sole ground" - and not any other contractual obligations. As for the German suggestion, he too wondered why a distinction should be made between future receivables and receivables that had already crystallized. Moreover, the interpretation of the expression "material breach" gave rise to great difficulties. Its use might therefore cause more problems than it solved. He would still prefer a text based on that proposed in paragraph 104.

50. Ms. GAVRILESCU (Romania) stressed that before any decision could be reached the Commission would need to see the written text of any proposal.

51. Mr. SALINGER (Observer for Factors Chain International) agreed with previous speakers that paragraph 104 concerned a core provision of the draft Convention. He had believed that, rather than dealing with the delegation or transfer of responsibility under a contract, the draft Convention concerned only the assignment of receivables. The objection to prohibiting the termination of a contract owing to the breach of an anti-assignment clause stemming from the fact that the performance of the assignee rather than that of the assignor was at fault was therefore irrelevant. As for the question of a material breach, the claim could be made that the breach was material if the contract referred to it as such. If, however, the draft Convention contained a provision that a contract could not be terminated except in respect of future receivables, the effect might also be to cancel out existing receivables, because under article 20 some contracts might allow for counterclaims by the debtor which could be set off against existing receivables. The assignee would therefore be left with nothing. If the Commission was interested in assisting the financing of trade receivables and obviating the need for financers to examine every contract, it would be well advised to include in the draft Convention the provision proposed in paragraph 104.

The meeting rose at 1 p.m.

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SUMMARY RECORD OF THE 693rd MEETING

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

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The meeting was called to order at 3.05 p.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/466, 470 and 472 and Add.1-4; A/CN.9/XXXIII/CRP.4 and 6-8)

1. Mr. TELL (France), replying to a statement made at the previous meeting by the United Kingdom representative, said that under the French Constitution, any international instrument ratified by France prevailed over national law. Thus, a provision like the one contemplated in paragraph 104 of document A/CN.9/470 would supersede the general principles of contract law in the French Civil Code. The fear expressed by the representative of Spain that the wording proposed by the German delegation would conflict with national law could just as easily be expressed with regard to the Secretariat suggestion. The only difference was that, under the German proposal, the possibility for the debtor to terminate the contract would be subject to the condition that there was a grave material breach of the contract.

2. It was one thing to state that the debtor did not have the right to avoid the contract on the ground that an anti-assignment clause had been violated; it was another thing to state, as in draft article 11, that the assignment of a receivable was effective notwithstanding the violation of any anti-assignment clause. For that reason, his delegation proposed that the following should be inserted after article 11 (1): "The avoidance of the original contract by virtue of such an assignment has no effect, in particular, on the rights acquired by the assignee against the debtor."

3. Ms. WALSH (Observer for Canada) said that she shared the concerns expressed by previous speakers with regard to the wording proposed by the German delegation and believed that paragraph 104, as drafted, adequately expressed the underlying idea of draft articles 11 and 12.

4. Mr. COHEN (United States of America) said that, while his delegation also supported the policy reflected in paragraph 104, it was mindful of the numerous problems identified by some delegations which were not comfortable with that paragraph without fuller explanation. Many of those problems arose from long-term contracts where the assignor might owe some obligations to the debtor. While some delegations had pointed out earlier that the draft Convention dealt only with assignment of receivables and not with delegation of duties, many contracts combined both and used "assignment" as a blanket term.

5. In order to clarify the intention in paragraph 104, his delegation proposed that in the bracketed part of the fourth sentence of that paragraph, after the words "(or that the debtor may not declare the original contract avoided on the sole ground that the assignor violated an anti-assignment clause", the following should be inserted: "unless the assignment materially impairs the debtor's ability to obtain performance owed to the debtor under the original contract. An assignment merely of the assignor's right to payment, and that has not delegated any duties owed to the debtor by the assignor, does not materially impair the debtor's ability to obtain performance owed to the debtor under the original contract".

6. The CHAIRMAN said he was not certain that the United States proposal was consistent with the Secretariat's proposal. He also requested the United States delegation to consider whether its proposal addressed the concerns expressed by the French delegation.

7. Mr. DOYLE (Observer for Ireland) expressed appreciation to the French delegation for attempting to move the issue along. Nevertheless, he failed to see how it would be possible to avoid the original contract and preserve the assignee's rights against the debtor. It was his understanding that the assignee's rights depended on the original contract. If there was no original contract, it was unclear how there could be a valid assignment.

8. All delegations understood that draft article 11 would present difficulties for certain delegations. If, however, there was a consensus in the Commission that the draft article was broadly acceptable, then those delegations, which included his own, would have to accept it.

9. With regard to the United States proposal, it was his understanding that draft article 11 dealt only with rights of payment. The only thing that the assignee wished to gain through assignment was the right to payment and the only concern of the debtor was the transfer of the duty to pay. He failed to grasp why it was necessary to deal with performance rights at all, and he therefore supported the Secretariat's proposal.

10. Mr. MORÁN BOVIO (Spain) said that he was almost fully in agreement with the statement made by the observer for Ireland. It was important to draw a distinction between the text proposed by the Secretariat, which was limited and very specific, and the proposal made by the German delegation, which would fully open up the possibility of avoidance of the contract based on how the anti-assignment clause was classified. The French proposal was therefore inadequate. As to the United States proposal, it could be included in the commentary, but he was in favour of leaving paragraph 104 as drafted.

11. Mr. FERRARI (Italy) said that, like the observer for Ireland, he did not believe that performance rights should be addressed and did not support the United States proposal. He agreed with the representative of Spain that the best way to deal with draft article 11 was to retain it as drafted or to insert in it wording from paragraph 104.

12. Ms. WALSH (Observer for Canada) said that she shared the concerns expressed by the observer for Ireland and the representative of Italy that the United States proposal might expand the intended scope of draft article 11.

13. Mr. FRANKEN (Germany) said that his delegation could accept either the United States proposal or the French proposal. If it was decided to retain the commentary, his delegation could also accept the wording proposed by the Secretariat in paragraph 104.

14. The CHAIRMAN said that a number of delegations strongly supported the Secretariat's proposal. Within that group, however, some delegations believed that the commentary should reflect certain views, while others wished to see a

paragraph (3) added to draft article 11 in order to reflect the understanding that draft article 11 was itself subject to certain exceptions.

15. Normally, in a situation where there was no consensus, the text would remain as drafted, but as there appeared to be different understandings of what draft article 11 (1) was intended to mean, he was reluctant to close the debate without a clear direction being taken by the Commission as a whole.

16. Mr. MORÁN BOVIO (Spain) said that in his opinion, the debate on the question was already closed. The German delegation had indicated that it had no difficulties with the text in paragraph 104 or with wording similar to what the United States delegation had proposed.

17. The CHAIRMAN said that it was necessary to clarify what was to remain in the commentary. The United States proposal was now supported by the German delegation, but that proposal differed somewhat from what was in paragraph 104. There was as yet no consensus on what policy was to be reflected in the commentary. He also wished to know whether there was any support for the French proposal.

18. Mr. COHEN (United States of America) said he agreed with the representative of Spain that the Commission was moving towards consensus on draft article 11 as supplemented by the Secretariat's point in paragraph 104. His delegation did not believe that its proposal was inconsistent with that paragraph; it was merely intended to explain the meaning of the phrase "on the sole ground". It was for the Commission to decide whether it preferred that phrase or the somewhat lengthy explanation proposed by his delegation. His delegation would be satisfied with either choice. It would be troubled, however, if draft article 11 was not supplemented by any of the wording in paragraph 104.

19. Mr. DESCHAMPS (Observer for Canada) requested the French delegation to clarify whether the effect of its proposal would be that, despite avoidance of the contract, the assignee could claim from the debtor receivables assigned under the assignment.

20. Mr. STOUFFLET (France) said it was his delegation's intention that, irrespective of possible avoidance, the assignee should retain all rights as against the debtor.

21. Mr. SALINGER (Observer for Factors Chain International) said that he wished to illustrate the point made by the observer for Ireland. If the assignee took assignment of the assignor's contract to sell goods over a period of a year, he would be selling one existing receivable and 11 future receivables. If the debtor was able to avoid the contract, his right to those future receivables must necessarily be affected. Accordingly, the French proposal did not resolve the issue. Either the debtor must not be allowed to avoid the contract, or, in the absence of agreement, the text should be left as it was.

22. Mr. DUCAROIR (Observer for the European Banking Federation) said that if the debtor was allowed to avoid the contract under the conditions proposed, the future assignment would have no effect on the assignee, who was frequently a

banker. He therefore shared the concerns expressed by the observer for Factors Chain International.

23. Ms. McMILLAN (United Kingdom) said that the current debate was very confusing. Her delegation supported the views expressed by the observers for Ireland and Factors Chain International. Either draft article 11 should be left as it was, or wording should be added to specify that the debtor could not declare the original contract avoided on the sole ground that the assignee had violated an anti-assignment clause. Anything more complicated would mean that the draft article would have no cost advantage at all, as it would simply give rise to litigation.

24. The CHAIRMAN said that, as there appeared to be no support for the French proposal, draft article 11 would remain as drafted. The only issue was how to explain it in the commentary. The United States delegation had suggested that its wording, to which the German delegation had agreed, could be combined with the Secretariat's proposal in paragraph 104.

25. Ms. WALSH (Observer for Canada) said it was clear from the debate that all that was required was to add the words proposed by the Secretariat to draft article 11.

26. Mr. FERRARI (Italy) said that the sentiment in the Commission was not as the Chairman had described. One delegation was in favour of the United States proposal; four had spoken against it; and one was in favour of the proposal in paragraph 104.

27. Mr. DOYLE (Observer for Ireland) said that he agreed with the three previous speakers and had no objection to the wording proposed by the United States being included in the commentary.

28. Ms. GAVRILESCU (Romania) said that her delegation, like those that had spoken previously, believed that draft article 11 should be supplemented by the Secretariat's proposal.

29. Mr. RENGER (Germany) said that his delegation could accept the Secretariat's proposal, provided that the wording proposed by the United States was included in the report and on the understanding that such wording did not affect the debtor's ability to obtain performance.

30. Mr. TELL (France) said that his delegation had always supported the text of draft article 11 and believed that its scope was clear. The debate had arisen because the Secretariat had put forward a proposal at such a late stage. His delegation's reservation concerning that proposal should be reflected in the summary record of the current meeting.

31. Mr. ATWOOD (Australia) said that his delegation supported the addition of the Secretariat's proposal to the wording in draft article 11.

32. The CHAIRMAN said he understood that the Commission wished the drafting group to incorporate the language suggested by the Secretariat in article 11 but to make clear that it was not intended to restrict any remedies the debtor might

have against the assignor for violation of an anti-assignment clause. The language proposed by the United States illuminating the distinction between right to payment and performance would be reflected in the commentary.

33. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the decision just taken raised another question. Article 11 (1) related to anti-assignment agreements not only between the debtor and initial assignor but also between subsequent assignors and assignees. His question was whether the new rule that the original contract could not be avoided on the sole ground of violation of an anti-assignment clause should be extended to subsequent assignment contracts.

34. Mr. MORÁN BOVIO (Spain) said he thought that the rule should apply down the entire chain of contracts. If an assignee violated an anti-assignment clause in the assignment contract by assigning the receivables in turn, he might be liable for damages or other remedies for breach of contract, but the contract should not be avoidable on that sole ground.

35. The CHAIRMAN, hearing no other views, said he took it there was general agreement that the drafting group should devise language to reflect the policy just outlined.

36. He invited the Commission to turn its attention to article 12 of the draft Convention.

37. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that article 12 was intended to ensure that rights securing payment of the assigned receivable followed the receivable. Paragraph 1 implied that, if the right securing payment of the assigned receivable was an accessory right, it would follow the receivable without a new act of transfer. If it was an independent but transferable right, the assignor would have an obligation to make a new act of transfer. As explained in the commentary (A/CN.9/470, para. 105), whether the right was accessory or independent would be left to the law governing the right.

38. Paragraphs 2 and 3 followed the logic of article 11 and applied it to transfer of security rights, with the effect that an anti-assignment agreement would not invalidate the transfer of the security right, but liability for breach of the agreement under national law would be preserved. Paragraph 4 was intended to preserve the rights of a debtor in the case of a transfer of a possessory property right. Paragraph 5 was intended to ensure that requirements of form under the law applying to the security right were not interfered with.

39. In view of the decision to include an article on the law applicable to form, article 12 (5) might have to be aligned with article 25, so that, if a receivable was secured, the law governing the security right would govern matters of form, as opposed to the law of the assignor's location. Since the rule on form was formulated as a "safe harbour" rule, the Commission might think the point was already sufficiently clear. In any case, the matter might already have been clarified with respect to real property by the new rule regarding receivables arising from or secured by real estate.

40. Mr. MORÁN BOVIO (Spain) said that, for the sake of conciseness, the Commission should consider adopting the suggestion of the Secretariat, expressed in the last sentence of paragraph 105 of the commentary (A/CN.9/470), that the second part of the first sentence of article 12 (1) from the word "unless" to the end should be deleted. The words in question were clearly superfluous, since the meaning was contained in the sentence that followed.

41. The CHAIRMAN said that, since there were no objections, the matter could be referred to the drafting group.

42. Mr. FRANKEN (Germany) recalled that, while there had been general agreement on excluding financial contracts governed by netting agreements from the draft Convention, his delegation had raised some concerns about non-financial contracts governed by netting agreements in connection with articles 11 and 12. His delegation, together with the observer for Canada and with the help of the United States delegation, had elaborated the following proposal for a partial exclusion to deal with those concerns, possibly for inclusion in article 4:

> "In the case of receivables arising under contracts governed by netting agreements, article 11 and article 12, paragraphs 2 and 3, apply only to the assignment of a receivable owed to the assignor upon net settlement of payments due pursuant to the netting agreement."

The effect would be that only the net balance after offsetting, which could become a receivable by novation, and not the component receivables, would be subject to the above-mentioned provisions of articles 11 and 12.

43. The CHAIRMAN invited the Commission to consider whether the proposal was acceptable and, if so, where in the draft Convention it should be placed.

44. Mr. SALINGER (Observer for Factors Chain International) said that his organization had no wish to prevent the proper operation of netting agreements, but he was concerned that the definition was too wide. As it stood, a netting agreement could refer to an agreement between any two parties to run a current account with complete set-off of all transactions. Under the new proposal, they could decide to enter into an anti-assignment agreement that would be effective except for the net balance. If such was the case, the provisions of article 20 whereby an assignment could intervene in the rights of set-off of unconnected transactions would have no effect. Perhaps a better definition of a netting agreement, limiting it to an organized practice in a particular trade or market, might avoid the problem.

45. The CHAIRMAN said he assumed that the dissatisfaction of Factors Chain International with the definition of netting agreement related to commercial rather than financial transactions.

46. Mr. MORÁN BOVIO (Spain) said that the observer for Factors Chain International had made a pertinent point. When the Commission had settled on a definition of netting agreement, it had had in mind financial rather than commercial transactions. He would appreciate clarification as to whether, pursuant to the proposal, articles 11 and 12 would apply to balances under netting agreements.

47. Mr. BRINK (Observer for the European Federation of National Factoring Associations (EUROPAFACTORING)) said that his Association had acquiesced in the exclusion of receivables governed by netting agreements in the financial markets because those markets were well supervised. If the exemption for netting agreements was broadened to industry and commerce, however, any commercial entity would be able to escape from the effects of article 11, which would erode the very core of the draft Convention. An assignee that had paid money for a receivable might find himself unable to claim it, and, because of that uncertainty, be less willing thereafter to make such a transaction.

48. Commerce and small- and medium-sized enterprises, especially in developing countries, were in great need of receivables financing. The industries that typically used well-organized netting agreements would not be inconvenienced by article 11 because they did not need that type of financing and would not be assigning their receivables.

49. Mr. COHEN (United States of America) said that his delegation fully supported the policies embodied in articles 11 and 12. However, legitimate concerns had been raised about the effect of the articles on the assignment of receivables governed by netting agreements of a kind not excluded from the draft Convention. Serious problems could arise, particularly with multiple assignments, if parties assigned component receivables subject to a netting agreement, but no such problem would arise with the netted amount, and article 11 could apply. That was the thrust of the proposal formulated in the ad hoc meeting convened by the German representative and the observer for Canada.

50. The intent was to save factors or other receivables financiers from unpleasant surprises, not to put them at a disadvantage. Perhaps that problem could be addressed by adding language to the effect that the netting agreements meant were those referred to in the original contract or contract of assignment, so that the assignee had a means of knowing about them.

51. Mr. DESCHAMPS (Observer for Canada) said that a careful reading of the definition of netting agreement had convinced his delegation that a current account would not be a netting agreement within the meaning of the definition.

52. Mr. TELL (France) said he thought that the proposal for a partial exclusion needed to be made more specific by a more precise definition of netting agreement; otherwise little would be left to which article 11 applied.

The meeting was suspended at 4.35 p.m. and resumed at 5 p.m.

53. Mr. IKEDA (Japan) said that the principle underlying draft article 12 was that security rights should be treated in the same way as other receivables for the purpose of limitations on assignment. Draft article 12, paragraphs (1), (4) and (5), dealt with the kinds of security rights which might be affected by the assignment of a receivable. Only paragraphs (2) and (3) were relevant to contractual limitations on assignment. He therefore assumed that the proposal in document A/CN.9/XXXIII/CRP.8 would apply to draft article 11 and to paragraphs (2) and (3) of draft article 12. He was anxious to clarify the connection between that proposal and the Canadian-German proposal read out by

the German representative earlier in the meeting. It was certainly necessary to have a special rule for netting agreements relating to assignments of commercial receivables. However, the wording was problematic, since the proposal in document A/CN.9/XXXIII/CRP.8 was essentially a list of inclusions, whereas the new proposal was exclusionary.

54. Mr. SCHNEIDER (Germany), referring to the concern expressed by the observers for Factors Chain International and EUROPAFACTORING, said that the new proposal used the term "netting agreement" according to the definition in draft article 6 (m) (A/CN.9/XXXIII/CRP.2). A netting agreement was invariably an agreement among three or more parties; if there were only two parties to the transaction, there would be rights of set-off between the assignor and the debtor, but the resulting balance would not be one created by a novation. In order to clarify that point, he suggested the insertion in the new proposal, after "contracts governed by netting agreements", of the words "involving more than two parties".

55. The CHAIRMAN recalled that the question of the number of parties involved in those transactions had been resolved in the course of the discussion on interbank payments systems.

56. Mr. MORÁN BOVIO (Spain) welcomed the new proposal, which made clear that receivables arising under a netting agreement, which would itself be excluded by draft article 4, could be assigned and were fully covered by draft article 11 and also, as the representative of Japan had pointed out, by draft article 12, paragraphs (2) and (3). He welcomed the proposal read out by the representative of Germany. Netting agreements were commercial not financial transactions and did not take place between credit institutions. It might therefore be desirable to define them more closely, with a view to determining how receivables arising from them should be handled.

57. The CHAIRMAN said that the Commission appeared to have agreed to accept the additional wording and must now decide where to place it. The text should perhaps be framed so as to apply to all netting agreements in the ambit of the draft Convention.

58. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) suggested that the additional wording proposed by the representative of Germany could usefully be included in the definition of netting agreements appearing in draft article 5 (m).

59. Mr. SCHNEIDER (Germany) said that his intention was not to reopen the discussion on the definition of netting agreements but merely to clarify the thrust of the original proposal. However, he would have no objection to the insertion of the additional words in the definition of netting agreements in draft article 5 (m).

60. Mr. COHEN (United States of America) said that he was unwilling to alter the definition of netting agreements already decided upon. The Commission had discussed at length the exclusion of financial contracts subject to netting agreements and had decided on the definition to be used for that purpose. If it now altered the definition as a result of the additional wording suggested by

the representative of Germany, serious problems might arise concerning the scope of the draft Convention. He urged the Commission to accept the proposal in its original form.

61. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said the observations by the representatives of Germany and the United States showed that the definition of netting agreements could be interpreted in different ways. A similar problem had arisen with the definition of interbank payments systems, and for that reason the Commission had decided not to include the definition proposed by the observer for the European Banking Federation. As a result, the question whether bilateral payments systems were covered by the exclusion in draft article 4 would be resolved by law outside the Convention. The difference of views concerning netting agreements and the number of parties involved could be addressed in the commentary to the draft articles, if the Commission so wished.

62. The CHAIRMAN said that the Commission would have to decide whether the same considerations as applied to interbank payments systems should also apply to netting agreements.

63. Mr. SCHNEIDER (Germany) explained that the balance formed by novation as the result of a netting agreement was a new receivable and had nothing in common with the receivables involved in the netting procedure. The mechanics of netting were described in document A/CN.9/472, footnote 2. That description showed that a netting arrangement would not work if only two parties were involved. He had the impression that for the factoring industry the term "netting agreement" as used in the draft articles was not clear enough. That was why he had suggested adding the words "involving more than two parties", which in his opinion would not affect the definition in draft article 5 (m).

64. The CHAIRMAN said that, since it was already clear that a netting agreement involved three or more parties, the addition would be simply for the avoidance of doubt.

65. Mr. ATWOOD (Australia) pointed out that the definition in draft article 5 (m) did not exclude an agreement between two parties only, since subparagraph (ii) referred to "a single payment by one party to the other".

66. Mr. COHEN (United States of America) said he wished to keep the definition as it stood. That definition was based on the comments by the European Banking Federation (A/CN.9/472/Add.1), which made no mention of three or more parties. The Commission had accepted the present definition for the purpose of excluding financial contracts based on netting agreements. The definition as it stood served the purpose of covering arrangements under different legal systems, some of which might provide for netting agreements between two parties only. If amended, it would not serve for the purpose of the exclusion.

67. Mr. DESCHAMPS (Observer for Canada) said it had been assumed during the Commission's discussions that it was not necessary for a contract to have more than two parties for it to qualify as a netting agreement. The definition of a netting agreement had been discussed in the context of agreements of the

International Swaps and Derivatives Association, which normally involved only two parties.

68. The CHAIRMAN suggested that the additional text proposed by the representative of Germany should apply only to commercial receivables.

69. It was so decided.

70. Mr. SALINGER (Observer for Factors Chain International), commenting on the United States proposal (A/CN.9/XXXIII/CRP.8), said he welcomed the fact that draft article 11 would not apply to factoring agreements. However, factoring agreements did not always apply to financial services; they were sometimes entered into in order to collect debts and protect assignors against bad debts. He proposed that the commentary to the draft articles would state that agreements for factoring or the discounting of receivables would be regarded as financial services for that purpose.

71. The CHAIRMAN said he took it that the Commission wished to accept that proposal.

72. It was so decided.

73. The CHAIRMAN suggested that the proposed exclusion should apply to draft article 12 (3).

74. It was so decided.

75. Mr. MORÁN BOVIO (Spain) drew attention to paragraph 108 of the commentary (A/CN.9/470), where it was suggested that if the Commission included a rule on the form of assignment of a receivable, the rule would need to be aligned with article 12 (5). He wondered whether it was necessary to alter paragraph 5, since the formulation of the rule in article 8 was broad enough.

76. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) recalled the Commission's decision that the form of an assignment should be covered by a "safe harbour" rule stating that the assignment of a receivable was valid as to form if it met the form requirements, if any, of either the law of the State in which the assignor was located or any other law applicable by virtue of the rules of private international law. In the case of assignment of a receivable secured by a mortgage, the applicable rules of private international law as to form should be sufficient to refer the matter to the law of the land.

77. The Commission's additions to article 4 dealt with priority and with the acquisition of a property right in real estate as a result of the assignment of a receivable related to that real estate. The new rule adopted under article 8, on the other hand, stated that if there were any form requirements as to an assignment, it would be sufficient to satisfy the law of the assignor, except where the receivable was mortgage-secured. The matter might therefore have to be addressed in article 12 (5). in order to make it clear that the form of a mortgage-secured assignment was subject to the law of the land.

78. Mr. MORÁN BOVIO (Spain) suggested that one could either add an exception in article 12 (5) for real-estate-based receivables, which were to be governed by the law of the land, or simply add a cross-reference to the other relevant provisions of the draft Convention.

79. Mr. BAZINAS, noting that article 12 (5) preserved the law applicable outside the Convention with regard to the form of assignments, said that the simplest course might be to state there that neither the new provisions in article 8 regarding form nor article 12 (1) affected any requirements of the applicable law.

80. Mr. DESCHAMPS (Observer for Canada) observed that the "safe harbour" rule in article 8 applied to a receivable itself, but his delegation was not at all sure that it could apply to the required formalities allowing an assignee to exercise his rights in respect of any property securing the receivable, which, moreover, might be governed not by the law of the assignor's location but by that of another State.

81. Mr. STOUFFLET (France) said he agreed with Canada that the Secretary's proposal needed clarification. Article 12 (5) was essential and very clear as it stood. What was not clear was the relationship to the latest version of article 8 (2).

82. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) observed that under the new article 8 rule it was sufficient if an assignee met the form requirements of the law of the assignor's location, but that the question then arose as to whether that would be sufficient for the transfer of a security right securing the receivable in question. That matter could be settled either by an explanation in the commentary on article 12 (5) or by adding in paragraph 5 itself the explanatory statement he had previously suggested. Article 12 (5) could stand as it was, except for the possible need for clarification.

83. Mr. DESCHAMPS (Canada) said that thus the intent of the addition the Secretary of the Working Group had proposed was to clarify that article 12 (5) would not defeat the purpose of new article 8 (2), which dealt only with the formal requirements for the assignment of a receivable, while article 12 (5) itself dealt with the formal requirements for transfer of security rights. He saw no inconsistency between the two provisions and no need to change article 12 (5). If, however, the Commission decided to amend article 12 (5) to eliminate any ambiguity, care should be taken not to weaken the new rule in article 8. It must remain clear that an assignee's right in respect of the receivable, was effective as soon as the formal requirements of the law of the assignor's location were fulfilled, even if the formal requirements for the transfer of the security rights were not yet met.

84. Mr. STOUFFLET (France) said that perhaps article 12 (5) and article 8 (2) should be kept as they were, each with its own clear purpose.

The meeting rose at 6 p.m.

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Thirty-third session

SUMMARY RECORD OF THE 694th MEETING

Held at Headquarters, New York,
on Friday, 23 June 2000, at 10 a.m.

Chairman: Mr. Jeffrey CHAN (Singapore)

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DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued)

ELECTION OF VICE-CHAIRMAN

This record is subject to correction.

Corrections should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent within one week of the date of this document to the Chief, Official Records Editing Section, room DC2-750, 2 United Nations Plaza.

Any corrections to the record of this meeting and of other meetings will be issued in a corrigendum.

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The meeting was called to order at 10.05 a.m.

DRAFT CONVENTION ON ASSIGNMENT OF RECEIVABLES (continued) (A/CN.9/470, A/CN.9/XXXIII/CRP.2 and Add.1, CRP.8)

1. Ms. SABO (Observer for Canada) said she would prefer to delete article 4 (2) of the text contained in document A/CN.9/470, as the Commission could not be certain that States would only resort to it in very limited circumstances. Article 4 (2) could create disharmony to an extent that would outweigh the benefit of bringing in more States.

2. Mr. ATWOOD (Australia) said he agreed that article 4 (2) should be deleted, as it would increase the complexity of application of the Convention.

3. Mr. RENGER (Germany) noted that in view of the list of exclusions, the loophole of article 4 (2) was unnecessary. It would endanger the aim of achieving uniform law.

4. Mr. TELL (France) said he had previously shared Germany's views with regard to article 4 (2) because he had believed that the content of certain other provisions was already fixed. However, the Commission's discussions were resulting in changes to some of those articles, and he could not be certain of the content of the debtor protection - or consumer protection - provisions, which might not even be discussed at the current session. The Commission was trying to discuss a final clause before knowing the full contents of the Convention. His delegation might later find it necessary to refer to a particular type of debtor under article 39; he therefore suggested that the Commission should defer the debate on article 4 (2).

5. Mr. BURMAN (United States of America) said he agreed with the views expressed by the French delegation. Article 39 might yet be a critical safety valve for a number of countries. In order to ensure broad support for the draft Convention, there had to be the possibility of excluding certain highly organized industries that did not wish to be covered by its rules.

6. It was premature to discuss what was in effect a final provision that could be discussed only when the rest of the draft Convention had been agreed on.

7. Mr. FERRARI (Italy) said that the Commission should wait at least until the discussion of the debtor protection rules, which were referred to in both articles 4 (2) and 39.

8. The CHAIRMAN said he took it that the Commission would defer its discussion of article 4 (2) until it undertook its consideration of article 39.

9. Mr. COHEN (United States of America) said that, according to the Commission's preliminary report, the issue of dematerialized securities holdings, and even repurchase agreements, might still need to be addressed in the context of exclusions. On the previous day the Commission had heard from Mr. Potok the International Bar Association's strong recommendation that the draft Convention should not cover assignments of receivables in investment

securities. The existing exclusions did apply to part of that area, but they did not address the key issue of the holding of investment securities through intermediaries.

10. Mr. RENGER (Germany) agreed that the issue should be addressed.

11. Mr. COHEN (United States of America) proposed that the exclusion relating to assignments of receivables arising from the sale or loan of investment securities should be expanded to read: "This Convention does not apply to assignments of receivables arising from the sale, loan, agreement to repurchase, or direct or indirect holding of investment securities, whether or not dematerialized."

12. Mr. DESCHAMPS (Observer for Canada) agreed that the draft Convention should not apply to assignments of receivables arising from investment securities. However, the text should not be complicated unnecessarily. Article 4 (2) (f) of document A/CN.9/XXXIII/CRP.2 already excluded assignments of receivables arising under or from "The sale or loan of, or agreement to repurchase, investment securities". He considered that language to be sufficient to cover securities. In addition, the draft Convention applied only to assignments of receivables, and a receivable was defined as a right to payment of a sum of money. The right to obtain delivery of receivables was not a receivable.

13. Mr. DOYLE (Observer for Ireland) agreed with the previous speaker. He had no objection to the United States proposal, but did not see how it was different to the proposal contained in document A/CN.9/XXXIII/CRP.2. If it was not a policy issue, the Commission could accept the wording already offered by the drafting group.

14. Ms. GAVRILESCU (Romania) said she did not oppose the United States proposal but felt that the previous speakers would need to reach agreement on the wording.

15. Mr. SMITH (United States of America) said that the existing language did not cover his delegation's concerns, as it did not refer to the mere holding of securities, especially their holding in an investment account or securities account.

16. If his previous proposal had been too ambitious, the addition of the words "holding of investment securities" to sub-paragraph (f) would be acceptable.

17. The CHAIRMAN noted that the Canadian delegation's point had not been addressed. The "holding" of securities would not seem to generate any rights to payment, with the possible exception of fees earned by the intermediary.

18. Mr. SMITH (United States of America) said that there were many situations where the holding of securities and other financial assets in a securities account resulted in a receivable owed to the customer of that account. Cash balances in securities accounts were not unlike deposit account cash balances, which were already excluded from the Convention. A broker could be obligated, when holding investment securities, to pay dividends received directly to the customer, or he could be obligated to sell securities which then created a

receivable owed to the broker. The money then paid by the broker to the customer might also be a receivable. Rather than debating whether all of those rights to payment were receivables covered by the Convention, they could all be excluded by language specific enough to resolve any ambiguity.

19. Mr. STOUFFLET (France) said there was another unresolved substantive issue. The drafting group had had difficulty in interpreting a provision of the United States proposal relating to the scope of articles 11 and 12, which read in part as follows: "This article applies only to receivables: (a) Arising under an original contract for the sale or lease of goods". It was not clear what was meant by the word "goods", and whether sub-paragraph (a) in document A/CN.9/XXXIII/CRP.8 should also include a reference to receivables arising from the sale or lease of real estate.

20. Mr. DUCAROIR (Observer for the European Banking Federation) said he welcomed the United States proposal, which filled a gap in the Federation's proposal. It was not a question of transactions involving the sale or lease of real estate securities, which were dealt with by professionals in the financial market, but of the holding of real estate securities by individuals or institutional investors. The United States proposal was indispensable, because the person who placed real estate securities in a bank or in another financial intermediary had a receivable that required compensation. The dematerialization of real estate securities meant that they could be placed in an account, as opposed to being held in a tangible form. If the intermediary was in default, compensation in cash would have to be provided.

21. Mr. DESCHAMPS (Observer for Canada) said that his previous statement had been motivated by a concern to establish a text that would be accessible to outsiders, and therefore not unnecessarily complicated. The United States delegation had convinced him that it was appropriate to ensure that monetary receivables that might arise from holding an account with a broker or some other financial intermediary should be referred to.

22. Mr. MORÁN BOVIO (Spain) said he supported the proposed amendment for the reasons expressed by the previous speakers. He also expressed a reservation with regard to the list of exclusions. All members of the Commission should urgently consider the practices included in the list and determine whether they were the ones intended to be included, and whether they had sufficient coverage. Particular care should be taken to ensure coverage of all of the transactions that the Commission wished to exclude from the draft Convention. The Commission's methods of work needed to be clarified, for it was very difficult to deal with a text that was agreed on at one moment and was then almost immediately amended.

23. Mr. MARADIAGA (Honduras) said that his delegation agreed with the delegation of Spain. Since article 4 (2) referred to article 39, in which there were exclusions, it could not be considered in isolation without full knowledge of what would be excluded from the draft Convention; that would negate the objective of achieving legislative harmonization and unification.

24. Mr. RENGER (Germany) said that his delegation supported the United States proposal. It was obvious that the payment of interest or dividends generated by

investment securities was a receivable, which arose through the direct or indirect holding of investment securities. The addition should therefore be made in order to have a complete understanding of what was excluded. There was no need for the words "whether or not dematerialized" because that was a technical aspect of securities trading.

25. Mr. TELL (France) said his delegation felt that it would be reasonable to exclude assignments of receivables arising from the holding of investment securities, if receivables arising from the sale or loan of investment securities were to be excluded. It was not necessary to specify whether the holding was direct or indirect, or whether or not the securities were dematerialized.

26. The CHAIRMAN said that the representative of France had summarized the direction in which the Commission seemed to be moving; the matter should be referred back to the drafting group. The representatives of Spain and Honduras had made the significant point that there must be clarity about exactly what was included in the draft Convention, and what was excluded. No surprises should be sprung after so many years of work.

27. Mr. TELL (France), referring to the Unites States proposal (A/CN.9/XXXIII/CRP.8), said that it was not clear whether the English word "goods" covered immovables.

28. Mr. MORÁN BOVIO (Spain) said that in Spanish, the word "bienes" could refer to movable or immovable goods.

29. The CHAIRMAN recalled that the Commission had conducted extensive deliberations on the question of excluding assignments of receivables arising from real estate transactions.

30. Mr. TELL (France) said that the word "biens" in French covered both movable and immovable goods. The problem was that the English word "goods" seemed to have a nuance which did not exist in other languages, and the Commission needed to know whether it covered immovable goods.

31. Mr. BAZINAS (Secretary of the Working Group on International Contract Practices) said that the Commission had considered an exception for rights arising from the sale or lease of real estate, and had decided that real estate should not be excluded. The question of whether the term "goods" included buildings had been raised in the drafting group but had been referred back to the Commission.

32. Ms. GAVRILESCU (Romania) said that her delegation fully agreed with the representative of France; in Romanian law, there was a clear distinction between movable and immovable goods. The English and French texts needed to be aligned.

33. Mr. FERRARI (Italy) said that the Commission should refer to other texts in which it had used the term "goods" and model the draft Convention on those texts.

34. Ms. McMILLAN (United Kingdom) said that land generally included buildings, but there was a distinction between goods and land, depending on the context.

35. Mr. DOYLE (Observer for Ireland) said his delegation agreed that the meaning of the term "goods" depended on the context. Goods would not include real estate, but real estate would include buildings. If there was any risk of ambiguity, the term "goods" could be defined in the text of the draft Convention.

36. Mr. SMITH (United States of America) said that it was his delegation's understanding that the Commission was talking not about buildings, but about goods in the narrow sense of personal property, rather than real property.

37. Ms. WALSH (Observer for Canada) said that her delegation believed that "goods" meant tangible movables or tangible personal property, and excluded real estate, including buildings.

38. Mr. STOUFFLET (France) said that there were two issues: whether receivables arising from real estate transactions were covered by the draft Convention, and how those receivables would be treated under articles 11 and 12.

39. The CHAIRMAN said that those issues had been debated at length; apparently the language was still not satisfactory.

40. Mr. SALINGER (Observer for Factors Chain International) said he felt that the issue of whether "goods" constituted real estate depended on the situation. For example, bricks being delivered to a building site were goods, but once they had been put in place and mortared, they were real estate.

41. Mr. MORÁN BOVIO (Spain) said he believed that, as agreed in the previous week, the draft Convention covered all real estate transactions, except in cases where national law excluded such transactions. There was no reason to exclude real estate operations in articles 11 and 12; the interpretation of the word "goods" in articles 11 and 12 should therefore include immovables.

42. Mr. DOYLE (Observer for Ireland) urged the Commission not to reopen the debate on article 11, since it had accepted the text contained in document A/CN.9/XXXIII/CRP.8. The Commission had agreed to the text; all it needed to do now was to fine-tune the language.

43. Ms. WALSH (Observer for Canada) said that her delegation believed that "goods" meant tangible personal property and did not include personal property at large. She did not think that an assignment of a receivable relating to the lease of land was included under article 11 3(a).

44. Mr. TELL (France) said that his delegation had always believed that the draft Convention applied to receivables arising from real estate operations. If the draft Convention did not cover real estate operations, there would be very little left.

45. The CHAIRMAN said that the issue was clear: one group of delegations believed that "goods" included real estate and would fall within the scope of

the draft Convention; and the other group believed that "goods" did not include real estate and that real estate did not fall within the scope of the draft Convention.

46. Mr. COHEN (United States of America) said that his delegation was concerned that a question of translation could reopen a number of major policy decisions already made by the Commission. The issue of the scope of the draft Convention had been considered and resolved; it did not arise in article 11, but was dealt with elsewhere. It was his delegation's understanding that article 11 (3) applied to receivables arising from original contracts for the supply or lease of goods, but not for the lease of buildings.

47. Mr. TELL (France) said that the problem was that while the scope of application of the draft Convention as a whole was not defined in an inclusive manner, the United States proposal for article 11 (3) had the effect of defining positively the scope of application of articles 11 and 12, which could disrupt the system established so far. He saw no justification for excluding real estate transactions.

48. The CHAIRMAN recalled that the wording in document A/CN.9/XXXIII/CRP.8 had been designed to meet concerns about national laws governing land and receivables arising from the sale of land.

The meeting was suspended at 11.30 a.m. and resumed at 12.10 p.m.

49. The CHAIRMAN invited the Commission to resume its debate on whether receivables arising from an interest in real estate should be among the exclusions listed in article 11.

50. Mr. DOYLE (Observer for Ireland) said that first of all the Commission should settle its definition of "goods". He commended the suggestion by the representative of Italy that the word should be used as it was understood in international business practice and in other UNCITRAL conventions, particularly the United Nations Convention on Contracts for the International Sale of Goods, which had been ratified by 54 States, including France. No ambiguity had arisen over the use of the word "goods" in that document. It was, however, open to the Commission to provide a definition of the term.

51. Mr. HERRMANN (Secretary of the Commission) said that the difficulty of working in the six official languages of the United Nations was sometimes underestimated. A term natural to one language might carry a different implication in another. In the French version of document A/CN.9/XXXIII/CRP.8, the equivalent of the word "goods" was "biens", which included real estate and buildings. He could not deny that in the past delegations had on occasion used such language differences to reopen issues that had been settled; but that was all the more reason to welcome any attempt at clarification, even if it lengthened the proceedings. Ultimately, however, the Commission should decide its view on an issue and then find the appropriate way to express its policy.

52. Mr. TELL (France), after acknowledging the wisdom of the Secretary's comments, proposed an amendment in English, prepared with the help of the Canadian delegation, to the United States proposal contained in document

A/CN.9/XXXIII/CRP.8. Subparagraph (a) should read: "Arising under an original contract for the supply or lease of goods or sale, lease or mortgage of real estate or the provision of services other than financial services."

53. Ms. WALSH (Observer for Canada) said that, owing to the confusion of the definition of "goods", the Commission had as yet reached no decision on the application of articles 11 and 12 to contracts relating to receivables arising out of immovable goods. Her delegation supported the expansion of the scope of the articles, as reflected in the French amendment, unless good reason was given why anti-assignment clauses should not be subject to the general rule under article 11.

54. Mr. COHEN (United States of America) said that his delegation was reluctant to lend its full support to the amendment proposed by the representative of France until it had had an opportunity to carry out consultations about its potential effect on the financing industry. Article 11 was a key provision of the draft Convention, on which consensus had been achieved only after much discussion. It had been recognized that the article need not apply to all assignments of all receivables because of the need not to upset well-established financing practices, in the field of real estate, among others. The proposed amendment undoubtedly gave article 11 a broader scope than his delegation had envisaged. He noted that the article did not mandate that anti-assignment clauses should be enforced. Domestic law could, therefore, override such a clause.

55. Mr. DOYLE (Observer for Ireland) said that the adoption of the proposed amendment would cause great difficulties for his delegation. The financing industry in Ireland was unwilling that real estate in any form should be covered by the draft Convention. His delegation had reluctantly agreed to the additional provision under article 4, but he had understood, on the basis of document A/CN.9/XXXIII/CRP.8, that article 11 would apply only to certain transactions relating to goods, not to real estate.

56. Mr. FRANKEN (Germany) expressed support for the proposed amendment. He saw no reason why receivables arising out of contracts relating to real estate should be excluded. Established practices need not be affected. Indeed, anti-assignment clauses were hardly ever encountered in contracts relating to real estate, in any case.

57. Ms. GAVRILESCU (Romania) expressed concern that the new provision created by the addition of the proposed amendment might cause confusion. There was no similar provision elsewhere in the draft Convention and she feared that the new provision which the Commission had recently adopted under article 4 might thereby be subject to a different interpretation from that intended. She was therefore in favour of leaving article 11 as it stood, particularly since the draft convention would, in principle, apply to all property except in those cases where it was overridden by domestic legislation.

58. Mr. TELL (France) said that there were no grounds for fearing that his proposed amendment would affect the exception contained in article 4. The amendment should, however, be passed on to the drafting group; he himself was not prepared to provide more than a rough translation of the English version.

59. Ms. McMILLAN (United Kingdom) said that the need to redraft provisions that had supposedly been finalized was an inevitable consequence of the Commission's decision to postpone consideration of the scope of the draft Convention to a very late stage.

60. She was prepared to accept the French proposal on the understanding that the assignment of receivables arising from land did not interfere with the internal legislation of the State where the land was located except insofar as that legislation was modified by the draft Convention itself.

61. She had serious reservations regarding the proposed amendment to article 4 (A/CN.9/XXXIII/CRP.2/Add.1); paragraph 3 (a) was unclear and paragraph 3 (c) was not an accurate representation of the outcome of the Commission's deliberations.

62. The CHAIRMAN said that the Commission would have to consider the entire report of the drafting group at a later date with such concerns in mind.

63. Mr. MORÁN BOVIO (Spain) said that he was in favour of the French proposal, since it provided the clarity that national industries would require in order to evaluate the draft Convention.

64. Mr. WINSHIP (United States of America) suggested that the text of the proposal should be placed in brackets and a decision on the matter postponed pending further consultations.

65. The CHAIRMAN noted that the Commission was meeting as a whole in order to finalize the provisions of the draft Convention. While he would defer to the wishes of the group, he did not think that there was broad support for postponing further discussion of the proposal.

66. Mr. IKEDA (Japan) noted that the word "goods" was translated as "biens" in the French text of document A/CN.9/XXXIII/CRP.8 but as "marchandises" in document A/CN.9/XXXIII/CRP.2/Add.1 (art. 11 (3) (a)). He also wondered whether the word "hypothèques" in the French proposal corresponded exactly to the English "mortgages". Lastly, if the Commission adopted the French proposal, the same amendment should be made to article 12.

67. The CHAIRMAN said that the Commission should concentrate on taking a clear policy decision; the drafting group would find the appropriate wording.

68. Mr. DESCHAMPS (Observer for Canada) suggested that further discussion of the matter should be postponed until the afternoon meeting so that the representatives of France and Canada could hold discussions with other participants in the interim. He was concerned that the mention of initial mortgage contracts might lead to the perhaps-inadvertent inclusion of a syndicated loan guaranteed by a mortgage. The Commission had already decided to preserve the clauses in syndicated loan contracts that made assignment subject to the consent of the borrower or the lead bank.

69. The CHAIRMAN asked whether the Commission wished to place the French proposal in brackets or to continue its efforts to find language that reflected the group consensus.

70. Mr. TELL (France) pointed out that on the previous day his own delegation had accepted language which it had earlier opposed but which had been approved by the Commission as a whole; it had not sought to place that text in brackets or to postpone the matter to a later date, and it would be equally inappropriate to do so in the case at hand.

71. The CHAIRMAN said that if he heard no objection, he would take it that the Commission wished to adopt the French proposal subject to drafting changes and to further consultations on the advisability of including a reference to mortgages.

72. It was so decided.

73. The CHAIRMAN invited the Commission to resume consideration of the report of the drafting group (A/CN.9/XXXIII/CRP.2/Add.1).

74. Ms. McMILLAN (United Kingdom) said that the proposed amendment to article 4 (3) (a) was quite incomprehensible from the point of view of British law. She took that provision to mean that the Convention did not affect any question as to whether an interest in land conferred a right in a receivable arising from a transaction related to that land. The words "interest in land" had a technical meaning, one illustration of which would be a freehold. But the question of how the fact of having a freehold interest in land could confer such a right - for example, in the case of a mortgage, how a freeholder could possibly have a right in the mortgage payments that he was obliged to pay to the mortgagee - would simply never arise. She wondered whether she had failed to grasp some essential aspect of the issue.

75. The proposed amendment to article 4 (3) (c) was similarly unclear.

76. Mr. DOYLE (Observer for Ireland) said that while he realized that the drafting group's task was a difficult one, the proposed amendment, and particularly paragraph (3) (a) thereof, bore little resemblance to the United States proposal on which it was based.

77. Mr. SMITH (United States of America) said he realized that translation was a difficult task and that some States' national legislation might not cover the issue addressed in the proposal.

78. The problem that his delegation had endeavoured to address in paragraph (3) (a) was that of a loan secured by a mortgage on real estate. In some countries, if that real estate was leased by its owner, the lease receivable was considered part of the mortgage. Alternatively, crops grown on mortgaged land might give rise to a receivable which might be considered part of the mortgage under domestic law. The intent had been to ensure that such cases were determined according to the domestic law of the country in which the real estate was located.

79. The purpose of subparagraph (b) was to state that in cases such as those which he had described, conflicts of priority between the assignee of the receivable and the holder of the mortgage were not covered by the draft Convention.

80. The CHAIRMAN said that the wording of the proposal had apparently been an attempt to address an issue arising from the Commission's discussions. However, it was not for the drafting group to consider matters that had not actually been discussed by the Commission as a whole; such problems should be referred back to the Commission for further consultation.

ELECTION OF VICE-CHAIRMAN

81. Mr. CACHAPUZ de MEDEIROS (Brazil), speaking on behalf of the Latin American delegations, nominated Mr. Maradiaga (Honduras) for the office of Vice-Chairman.

82. Mr. Maradiaga (Honduras) was elected Vice-Chairman by acclamation.

The meeting rose at 1 p.m.